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UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA

IN RE:

Phillip Michael Messer

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Case No. 96-550617 C-7

**ORDER DENYING MOTIONS BY WILSON, BIESECKER, TRIPP & SINK TO PAY
JUDGMENT AND DENYING RELIEF FROM STAY TO EXECUTE ON JUDGMENT**

This matter came on for hearing after due and proper notice before the undersigned Bankruptcy Judge on September 20, 2000 in Winston-Salem, North Carolina on the Motion of Wilson, Biesecker, Tripp and Sink for an Order Directing the Payment of a Judgment or Alternatively for Relief from Stay to Execute on Judgment. Appearing before the court were John Boddie on behalf of the Debtor, Kathryn L. Bringle on behalf of the Chapter 13 Trustee, Edwin H. Ferguson, Jr. as Chapter 7 Trustee, Max R. Rodden on behalf of creditor Wilson, Biesecker, Tripp & Sink. Having reviewed the record and the file in this proceeding, the court makes the following:

FINDINGS OF FACT

1. The above captioned Debtor filed a petition for relief under Chapter 13 on May 10, 1996. The Debtor's plan was confirmed by order of the Court on July 30, 1996.
2. At the time the Debtor filed for bankruptcy, he owned no real property. Wilson, Biesecker, Tripp and Sink (hereinafter "Wilson, Biesecker") filed an unsecured proof of claim in the Chapter 13 proceeding in the amount \$6,769.34 and attached a copy of the judgment that had been entered and docketed in Davidson County, North Carolina against the Debtor.
3. After the filing of the Chapter 13, the Debtor inherited real property. This property became property of the estate as defined under 11 U.S.C. § 1306 and the Debtor's plan was modified to pay all creditors in full. Prior to the repayment of all creditors in full, the Debtor converted to a Chapter 7. It is unknown at this time if creditors will be paid in full by the Chapter 7 Trustee.
4. The Debtor received his discharge on July 12, 2000.
5. Wilson, Biesecker contends that they should be treated as a secured creditor in the Chapter 7 proceeding or alternatively that they should be given relief from stay to execute on their judgment.

ISSUE

Does a pre-petition judgment attach to real property acquired through inheritance by the Debtor during the bankruptcy?

DISCUSSION

A pre-petition judgment will not attach to real property acquired through inheritance by the Debtor during his bankruptcy proceeding. The Fourth Circuit addressed this issue on two occasions in 1999. In the case of In re Avis, 178 F.3d 718 (4th Cir. 1999), the IRS had, before the bankruptcy petition was filed, taken all required steps to obtain its lien on the debtors after acquired property pursuant to §§ 6321 and 6323 of the tax code. During the bankruptcy, the Debtor became the beneficiary of an estate and inherited an interest in real property. The IRS contended that their lien became perfected as "a matter of law" and that they should be treated as a secured creditor. The debtor argued that the attachment of a federal tax lien on property acquired during the bankruptcy proceeding is an "act" that is stayed pursuant to 11 U.S.C. § 362. The court agreed with the Debtor and found that "until the lien attaches to the property, it is inchoate." Id. at 722. The lien was prevented from attaching when it came into the bankruptcy estate as it was subject to the provisions of section 362 automatic stay.

The court reached a similar ruling in In re Birney, 200 F.3d 225 (4th Cir. 1999). In Birney, only the male debtor filed for bankruptcy and on the petition date, the debtor and his wife owned real property as tenants by the entireties. A creditor had obtained a pre-petition judgment solely against the debtor which, under Maryland law, did not attach to entireties' property. The debtor exempted the real property and, after the bankruptcy filing, his wife died. After the debtor received his discharge, the creditor tried to foreclose on the real property claiming that the creditor had acquired a lien on the property at the death of the debtor's spouse by operation of law. The Fourth Circuit made it clear that the lien did not attach. The court stated that during the period between the debtor's bankruptcy filing and the discharge of his case, no lien could attach because of the automatic stay imposed under 11 U.S.C. § 362. Further, the lien could not attach at any time following the debtor's discharge since the discharge extinguished the underlying debt on which the lien was based.

Based on the foregoing it is hereby, **ORDERED, ADJUDGED AND DECREED** that

1. The motion by Wilson, Biesecker, Tripp and Sink to pay the judgment as a secured claim or alternatively for relief from stay to execute on the judgment is denied as no lien attached to the real property.

2. Wilson, Biesecker, Tripp and Sink shall be granted a general unsecured claim in this proceeding in the amount of \$6,769.34.

This the 15 day of November, 2000.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge